



Judiciary Committee
October 11, 2012

Comparison of Model Protection of Charitable Assets Act with Legislative Council Bill Draft 13.0129.01000

NOTE:

Yellow highlighted material is included in the Model Act but is not included in the Legislative Council bill draft 13.0129.01000

Green-shaded and underscored material is included in the bill draft but is not part of the Model Act

All remaining content is included in both the bill draft and the Model Act

MODEL PROTECTION OF CHARITABLE ASSETS ACT

SECTION 1. DEFINITIONS. In this [act]:

- (1) "Charitable asset" means property that is given, received, or held for a charitable purpose. The term does not include property acquired or held for a for-profit purpose.
- (2) "Charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of a governmental purpose, or any other purpose the achievement of which is beneficial to the community.
- (3) "Person" means an individual, corporation, estate, trust, business trust, statutory trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.
- (4) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- (5) "Responsible individual" means an individual who, with respect to a person holding

charitable assets:

(A) Is generally familiar with the affairs of the person; and

(B) Participates, directly or indirectly, in the control or management of the person.

(6) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

**SECTION 3. AUTHORITY OF [ATTORNEY GENERAL] TO PROTECT
CHARITABLE ASSETS.**

(a) The [Attorney General] shall represent the public interest in the protection of charitable assets and may:

(1) enforce the application of a charitable asset in accordance with:

(A) the law and terms governing the use, management, investment, distribution, and expenditure of the charitable asset; and

(B) the charitable purpose of the person holding the asset;

(2) act to prevent or remedy:

(A) the misapplication, diversion, or waste of a charitable asset; or

(B) a breach of fiduciary or other legal duty in the governance, management, or administration of a charitable asset; and

(3) commence or intervene in an action to:

(A) prevent, remedy, or obtain damages for:

(i) the misapplication, diversion, or waste of a charitable asset; or

(ii) for a breach of fiduciary or other legal duty in the governance, management, or administration of a charitable asset;

(B) enforce this [act]; or

(C) determine that an asset is a charitable asset.

(b) If the [Attorney General] has reason to believe an investigation is necessary to determine whether action is advisable under this [act], the [Attorney General] may conduct an investigation, including exercising administrative subpoena power under [law of this state providing for administrative subpoena power].

(c) This [act] does not limit the powers and duties of the [Attorney General] under law of this state other than this [act].

(d) The [Attorney General] shall promulgate rules to implement [this [act]] [Sections 4(a) and (e), 5(a), 6, 7(b), and 8.

2. In an action commenced by the attorney general pursuant to this section, the court may remove any officer, director, or responsible individual who has engaged in:

a. The misapplication, diversion, or waste of a charitable asset;

b. A breach of fiduciary or other legal duty in the governance, management, or administration of a charitable asset; or

c. Fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to a charitable asset.

3. Whenever it appears to the attorney general that a person has engaged in, or is engaging in, any practice in violation of this chapter or other provisions of law, or when the attorney general believes it to be in the public interest to investigate whether a person has in fact engaged in, is engaging in, or is about to engage in, any unlawful practice under this chapter, or it is otherwise necessary to protect charitable assets, the attorney general may conduct an investigation, and in enforcing this chapter, has all the powers provided in this chapter or chapter

50-22 or 51-15, and may seek all remedies in this chapter or chapter 50-22 or 51-15.

4. This chapter does not impair the rights and powers of the attorney general or courts of this state with respect to any charitable assets. This chapter is in addition to, and does not supersede, any other authority of the attorney general established by statute, case law, or common law.

5. The attorney general may bring an investigation or action pursuant to this chapter in the county in which the charitable assets are held, in the county in which the person holding the assets is located, or in Burleigh County.

SECTION 4. REGISTRATION.

(a) The [Attorney General] shall establish and maintain a public registry of persons registered under this section.

(b) Except as otherwise provided in subsection (c), a person is required to register if the person holds, or within the preceding 12 months received, charitable assets with a value in the aggregate exceeding \$[50,000] and:

(1) is formed under the law of this state or, if the person is a trust, has its principal place of administration in this state;

(2) has its principal place of business in this state;

(3) holds charitable assets with a value in excess of \$[50,000] in this state other than assets held primarily for investment purposes; or

(4) subject to subsection (d), conducts activities in this state for a charitable purpose.

(c) The following are exempt from the requirement in subsection (b) to register:

(1) a government or governmental subdivision, agency, or instrumentality;

(2) an organization the primary purpose of which is to influence elections or legislation;

(3) with respect to charitable assets that belong to another person, a financial institution, attorney's trust account, investment company, licensed escrow agent, or storage facility;

(4) a [personal representative] of a decedent's estate that holds a charitable asset, during the period of administration of the estate; [and]

(5) a trustee of a revocable trust that becomes irrevocable because of the settlor's death, during a period of administration following the settlor's death not to exceed two years[.][; and]

[(6) a person that has as its primary activity advocacy on issues of public or governmental policy][.][; and]

Alternative A

[(7)] a religious organization, an organization operated, supervised, or controlled by or in connection with a religious organization, or an officer or director of, or a trustee that holds property in an official capacity for an organization described in this paragraph.]

Alternative B

[(7)] a [church][house of worship], a convention or association of [churches][houses of worship], or an integrated auxiliary of a [church][house of worship].]

Alternative C

[(7)] a religious organization as defined by [insert statute].]

Alternative D

[(7)] a person that holds assets for the advancement of religion and is not required

to report to the Internal Revenue Service, to the extent of those assets.]

End of Alternatives

(d) The following activities, without more, do not constitute conducting activities in this state for a charitable purpose:

(1) maintaining, defending, mediating, arbitrating, or settling an action or proceeding;

(2) holding a meeting of trustees, directors, or members;

(3) maintaining an account in a financial institution or an investment account;

(4) holding real or personal property;

(5) engaging in an isolated activity that is not in the course of similar activities;

[and]

(6) making a grant, scholarship, or award to a person in this state[.]; and

(7) soliciting or accepting contributions.]

(e) Unless the [Attorney General] grants a waiver under Section 8(a), a person required by this section to register shall register with the [Attorney General] not later than [three] months after the date charitable assets held by the person exceed the value of \$[50,000].

(f) The registration required by subsection (b) must provide:

(1) the name and address of the person;

(2) the name and address of the statutory agent of the person for service of process or the individual on whom service of process may be made;

(3) the name and contact information of a responsible individual of the person;

(4) the federal employer identification number, if any, for the person; [and]

(5) information concerning the federal tax status of the person[.];[.]; and]

[(6) a copy of the record, however denominated, that describes the charitable purposes of the person and the use and administration of charitable assets held by the person[.]
[; and

(7) the name under which the person has registered under [the state's solicitation statute] and the registration number, if any.]

(g) A registration pursuant to subsection (b) is terminated on the filing with the [Attorney General] by the person registered of:

(1) a written notice of termination of registration that states the person no longer holds a charitable asset and has no reasonable expectation it will hold charitable assets with a value in the aggregate exceeding \$[50,000] in the next 12 months; and

(2) an annual report for the current year.

SECTION 5. ANNUAL REPORT.

(a) [Unless the [Attorney General] grants a waiver under Section 8(b),] [A] [a] person required to register under Section 4 which holds charitable assets with a value exceeding \$[50,000] at the end of the person's most recent annual accounting period or receives charitable assets with a value in the aggregate exceeding \$[50,000] during the period shall file with the [Attorney General], not later than the later of four months and 15 days after the end of the period or the date authorized for filing an informational return with the Internal Revenue Service, including all extensions, an annual report providing [and verifying][and certifying the accuracy of] the following information:

(1) the name and address of the person;

(2) the name and address of the statutory agent of the person for service of process or the individual on whom service of process may be made;

(3) the name and contact information of a responsible individual of the person during the period;

(4) a description of the person's most significant charitable activities, not exceeding three, during the period;

(5) whether during the period the person:

(A) engaged in an event described in Section 6(a) or (b);

(B) entered into a contract, loan, lease, or other financial transaction with an officer, director, trustee, or other fiduciary of the person, or a [family member] of an officer, director, trustee, or other fiduciary of the person, either directly or with an entity in which the officer, director, trustee, other fiduciary, or [family member] had a material financial interest;

(C) became aware of an embezzlement, theft, or diversion of a charitable asset of the person;

(D) became aware of use of a charitable asset of the person to pay a penalty, fine, or judgment;

(E) became aware of the payment by an officer, director, trustee, or other fiduciary of the person of a penalty, fine, or judgment with respect to the person;

(F) became aware of the use of restricted funds of the person for a purpose other than the charitable purpose specified in the restriction; or

(G) received notice of revocation, modification, or denial of its federal or [state][local] charitable [income] tax exemption;

(6) an explanation of an affirmative answer reported under paragraph (5)[.][;][; and]

[(7) the person's total revenue relating to its charitable assets for the period; [and]

(8) the value of the person's charitable assets as of the last day of the period[.][;][; and]

[(9)] a change to any information provided under Section 4 [.][; and

(10) the name under which the person has registered under [the state's solicitation statute] and the registration number, if any.]

(b) If a person required to file an annual report under subsection (a) is required to file a federal information return with the IRS, the person shall attach to the annual report a copy of the publicly available part of the most recently filed return.

SECTION 6. NOTICE TO [ATTORNEY GENERAL] OF REPORTABLE EVENT.

(a) A person required to register under Section 4 shall give notice in a record to the [Attorney General] not later than [20] days before any of the following events:

(1) dissolution of the person;

(2) termination of the person;

(3) disposition by the person of all or substantially all of the charitable assets of the person;

(4) removal of the person from the jurisdiction of this state;

(5) removal of significant charitable assets of the person from this state; or

(6) an amendment of the record that describes the charitable purposes of the person and the use and administration of charitable assets held by the person.

(b) A person required to register under Section 4 shall give notice in a record to the [Attorney General] not later than [90] days before the consummation of a merger, conversion, or domestication of the person.

(c) A transfer of a charitable asset in connection with an event described in subsection (a) or (b) which occurs earlier than [20] days after giving the notice required by subsection (a) or earlier than [90] days after giving the notice required by subsection (b) is a violation of this [act] unless, before the transfer, the person receives from the [Attorney General] in a record consent to the event or notice that the [Attorney General] will take no action regarding the event.

(d) If a decedent's estate opened by a court in this state involves, or may involve, the distribution of property to a person holding charitable assets, unless the distribution is a nonresiduary devise with a value of less than \$[50,000] to a named person, the [personal representative] shall deliver to the [Attorney General] not later than [90] days after the date the [personal representative] is appointed:

- (1) a copy of the will;
- (2) a copy of the [application] [petition] for probate; and
- (3) a copy of the inventory or, if none is filed with the court, a statement of the

value of the estate.

(e) If a revocable trust becomes irrevocable because of the settlor's death, has its principal place of administration in this state after the settlor's death, and provides for a distribution of property to a person holding charitable assets, unless the distribution is a nonresiduary devise with a value of less than \$[50,000] to a named person, the trustee shall deliver to the [Attorney General] not later than [90] days after the date of the settlor's death:

- (1) a description of the charitable interests; and
- (2) a statement of the value of the trust assets.

(f) A person required to register under Section 4 shall give notice in a record to the [Attorney General] not later than [20] days after receipt of a notice of revocation, modification,

or denial of its federal or [state][local] charitable [income] tax exemption.

**SECTION 7. NOTICE TO ATTORNEY GENERAL OF ACTION OR
PROCEEDING.**

(a) This section applies to an action or proceeding in this state in a federal or state court:

(1) by, against, or on behalf of a person holding a charitable asset in which the relief sought relates to a gift of a charitable asset;

(2) concerning the use of a charitable asset or a breach of duty or other obligation owed to a person holding a charitable asset;

(3) by, against, or on behalf of a person holding a charitable asset in which the relief sought includes:

(A) instruction, injunction, or declaratory relief relating to the management, use, or distribution of a charitable asset;

(B) construction of a record under which a charitable asset is held;

(C) modification, reformation, interpretation, or termination of the terms of a record under which a charitable asset is held;

(D) removal, appointment, or replacement of a trustee of a charitable trust; or

(E) a challenge to the administration of or a distribution from a decedent's estate or a trust in which matters affecting a charitable asset may be decided; and

(4) for bankruptcy under federal law, receivership under [state receivership statute] or a similar receivership statute of another state, or relief in any other insolvency proceeding.

(b) If an action or proceeding to which this section applies is commenced by or brought

against a person in this state, the party seeking relief shall give notice in a record to the [Attorney General]. The notice must include a copy of the initial pleading. An order, decree, or judgment rendered in an action in which notice is required by this section is not binding on the [Attorney General] if the notice has not been given.

SECTION 8. WAIVER OF FILING OF REGISTRATION [OR ANNUAL REPORT].

[(a)] The [Attorney General] may waive registration under Section 4 by a person required to register only under Section 4(b)(3) or (4) if the person is registered in another state under a law that is substantially similar to this [act] and files with the [Attorney General] a copy of the registration filed in the other state.

[(b)] The [Attorney General] may waive the requirement to file an annual report under Section 5 if the person required to make the filing files a report pursuant to [insert state charitable solicitation statute or other statute].]

SECTION 9. FEES.

Alternative A

(a) A person required to register under Section 4 shall pay a fee of \$[15] with the registration and, if the registration is not filed timely, a late fee of \$[100].

(b) A person required to file a report under Section 5 shall pay a fee of \$[15] with the report and, if the report is not filed timely, a late fee of \$[100].

Alternative B

The [Attorney General] shall adopt rules in accordance with [this state's administrative procedure act] setting fees for filing, and for late filing, of a registration under Section 4 and an

annual report under Section 5.

10-37-04. Civil penalties - Costs recoverable.

In any action brought under this chapter or under other provisions of law, including chapter 50-22 or 51-15, the court shall award to the attorney general reasonable attorney's fees, investigation fees, costs, and expenses for any investigation and action brought under this chapter, or under other provisions of law, including chapter 50-22 or 51-15. The court shall award the attorney general a civil penalty of not more than five thousand dollars for each violation of this chapter or for each violation of chapter 50-22 or 51-15. A violation of this chapter constitutes a violation of chapter 51-15. The remedies, duties, prohibitions, and penalties of this chapter are not exclusive and are in addition to all other causes of action, remedies, and penalties as provided in chapter 50-22 or 51-15, and as otherwise provided by law. All civil penalties, attorney's fees, investigation fees, costs, and expenses received by the attorney general under this chapter must be deposited into the attorney general refund fund.

SECTION 10. COOPERATION WITH OTHER OFFICIAL.

(a) The [Attorney General] may cooperate with an official of this state, another state, the United States, a foreign government, or a governmental subdivision, agency, or instrumentality of any of the foregoing charged with protecting charitable assets.

(b) The [Attorney General] may:

(1) notify an official described in subsection (a) of the commencement, status, or resolution of an investigation or proceeding pursuant to this [act];

(2) make available to the official information relating to a charitable asset which is relevant to the official's protection of charitable assets; or

(3) request from the official information relevant to an investigation pursuant to

Section 3.

[SECTION 11. PUBLIC RECORDS. A registration filed under Section 4 and an annual report filed under Section 5 are public records. The [Attorney General], on the written request of a person required to register under Section 4, shall withhold from public inspection any part of the person's registration or annual report which does not relate to a charitable purpose or charitable assets and is not otherwise a public record.]

SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 13. REPEALS. The following are repealed:

SECTION 14. EFFECTIVE DATE. This [act] takes effect